No. 96-126

(2)

Supreme Court, U.S.
FILED
AUG 19 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

WALKER L. CHANDLER, SHARON T. HARRIS, and JAMES D. WALKER,

Petitioners,

v.

HONORABLE ZELL D. MILLER, LOUIS MASSEY,[1] and JAMES G. LEDBETTER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Eleventh Circuit's opinion, finding O.C.G.A. § 21-2-140, which requires drug testing of persons seeking to qualify for nomination or election to high state offices, valid under the Fourth Amendment, consistent with this Court's drug testing cases, *Skinner* and *Von Raab*?

2. Does O.C.G.A. § 21-2-140, which requires a potential candidate to pass a drug test but does not restrict in any manner the potential candidate's freedom of expression of ideas, constitute a violation of the First Amendment right to free speech?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Miller, Massey, and Ledbetter respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 73 F.3d 1543 (1996).

STATEMENT OF FACTS

Respondents accept the Statement of Facts as set forth in Petitioners' Brief with the exception of Petitioners' final sentence as to the purported error in the Eleventh Circuit's decision.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision below is consistent with this Court's decisions in *Skinner* and *Von Raab*.

The Eleventh Circuit's opinion is entirely consistent with this Court's decisions in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). The lower appellate court held, first, that O.C.G.A. § 21-2-140 involves a special need beyond the ordinary needs of law enforcement and, second, that the state's interest in serving such need outweighs the privacy interest of the individual seeking to qualify for public office.

The "special need" identified by the panel which triggered the *Skinner-Von Raab* balancing test was the fundamental incompatibility of holding high public office and the use of illegal drugs. The opinion lists at least two components of this "special need:"

> [T]hose vested with the highest executive authority to make public policy in general and frequently to supervise Georgia's drug interdiction efforts in particular must be persons appreciative of the perils of drug use.
>
> But drug use poses significant dangers beyond rendering elected officials unsympathetic to drug interdiction efforts. The nature of high public office in itself demands the highest levels of honesty, clear-sightedness, and clear-thinking. . . . Simply put, the state's interest in filling these positions with drug-free people is great.

73 F.3d at 1546 (footnotes omitted).

Surely the state government experiences the same need for a drug free governor, legislator, supreme court judge or public service commissioner as the federal government does in identifying and removing drug users from its force of employees involved in drug interdiction. *See Von Raab*, 489 U.S. at 666, 109 S.Ct. at 1391. Many, if not all, of these state office holders enjoy authority over some aspect of the drug interdiction efforts or over other state employees who are intimately involved in such programs. Because the responsibilities of their office involve or may involve some aspect of the illegal drug industry, whether in law enforcement, transportation,

criminal justice, legislation, or financing, high public officials stand as potential targets of pressure, legal or illegal, from persons and entities bent upon furthering illegal drug trafficking and use in Georgia.

Petitioners base their Petition for Certiorari on their disagreement with the philosophy underlying O.C.G.A. § 21-2-140 rather than on a serious claim that such interest is not a "special need" as identified by this Court in the *Skinner* and *Von Raab* decisions. They apparently do not challenge the Eleventh Circuit's decision on the second part of the *Skinner-Von Raab* test, that is, that the state's interest in drug-free elected officials outweighs the potential candidate's privacy interests. Thus, the question of whether a conflict exists between the Eleventh Circuit's decision in this case and the *Skinner-Von Raab* cases is very limited. The lower appellate court appropriately identified a legitimate special need and its opinion is entirely consistent with the controlling decisions of this Court.

Petitioners refer this Court, in part B of their argument, to an academic law journal's summary of a post-enactment telephone interview with a Georgia legislator, relied upon by Judge Barkett in her dissent. 73 F.3d at 1552-1553 n. 7. As the majority pointed out, this Court has rejected such after-the-fact pronouncements by legislators as competent legislative history. 73 F.3d at 1549 n. 5, citing *Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 132, 95 S.Ct. 335, 353, 42 L.Ed.2d 320 (1974).

2. O.C.G.A. § 21-2-140 does not violate the First Amendment rights of a potential candidate for state political office.

Contrary to the argument posed in Petitioners' brief, the requirement that an individual undergo a test for illegal drugs in order to be eligible to run for political office does not affect the speech rights of the potential candidate. Instead, as the Eleventh Circuit correctly found, if the statute affects speech rights in any respect, it involves a mixture of speech and conduct. Accordingly, in order for O.C.G.A. § 21-2-140 to be valid under the First Amendment, it must meet the four part test adopted by this Court in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). The Eleventh Circuit analyzed the statute under each step of this test and found it to be constitutionally valid. Petitioners apparently do not challenge this analysis but argue, at least implicitly, that *O'Brien* has no application because O.C.G.A. § 21-2-140 constitutes a "pure speech" regulation.

In making this argument, Petitioners characterize the statutory drug test requirement as "establishing a certain ideology as a qualification for holding public office." Petitioners' brief at 16. As is obvious, Petitioners disagree that the state has the right to require such testing. Consequently, they argue, compliance by them with the statute will force them to "abandon their principles," in violation of their First Amendment right to free speech. Petitioners remain free at all times, however, both before and after election, to speak out against the requirement and to push for its repeal. Undergoing the drug test no more compels a potential candidate who disagrees with the

statutory requirement to abandon his principles than does payment of local, state, or federal taxes by a potential candidate for state or federal office who challenges the government's right to tax or its use of taxes once collected.

The Eleventh Circuit correctly rejected Petitioners' implicit contention that the drug testing statute constitutes a "pure speech" regulation. The lower appellate court appropriately analyzed the Georgia statute under the *United States v. O'Brien* test and correctly found the statute to be valid under the First Amendment.

3. O.C.G.A. § 21-2-140 is plainly valid under the Thirteenth and Fourteenth Amendments.

The Eleventh Circuit expressly found Petitioners' argument under the Thirteenth Amendment to be "either abandoned or without merit." 73 F.3d at 1545 n. 2. The argument presented to this Court, that the candidate drug testing statute constitutes a "badge of servitude" is, as the Eleventh Circuit held, without merit and certainly does not justify review by this Court.

Petitioners' argument under the Fourteenth Amendment ignores that the Georgia legislation under attack must be supported only by a rational basis. *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). As the Eleventh Circuit observed, "the importance of the mental, emotional, and physical health of high public officials," is not an irrational basis for requiring potential candidates for such offices to undergo testing for illegal drugs. 73 F.3d at 1548.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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